

**BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA**

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**IN THE MATTER OF THE GREEN                    )  
MEADOW PETITION FOR CONTROLLED        )  
GROUND WATER AREA NO. 41I 30022395    )**

**ORDER SETTING  
SCHEDULE AND PROCEDURE**

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**BACKGROUND**

This Order sets forth the schedule and procedure to be followed in the Matter of the Green Meadow Petition for Controlled Ground Water Area No. 41I 30022395 to be conducted pursuant to Montana Code Annotated §§85-2-506 and -507 (2005). This proceeding is not subject to the Montana Administrative Procedure Act (MAPA), Mont. Code Ann. §2-4-601 (2005), *et seq.* The application of MAPA to this proceeding was repealed in 1995. Mont. Code Ann. §85-2-519 (repealed), Sec. 500, Ch. 418, L.1995. As a result, the Department's contested case proceeding rules, Administrative Rules of Montana (A.R.M.) Title 36, Part 12, Subchapter 2, do not apply. For this reason, the Department is setting forth the schedule and procedure to be followed in this Order.

By this Order the Department endeavors to balance the ability of unrepresented citizens to participate fully in this matter, the desire of those with legal counsel to have a set of rules governing the proceeding, and the Department's statutory requirement to conduct a full, fair, and orderly proceeding to permit all relevant evidence to be received pursuant to Mont. Code Ann. §§85-2-506 and -507. This proceeding involves citizens appearing on their own behalf as Full Parties as well as organizations and citizens represented by legal counsel. The Hearing Examiner listened to the concerns of the parties at the Scheduling Conference on October 18, 2006, and to the extent possible, those concerns have been incorporated into this Order. Because there is not a specific set of rules to govern this proceeding, I must establish all of the

procedures and the schedule in this case by order. Where possible, I have cited Department rules that will be followed.

On October 18, 2006, at 9:00 a.m., a Scheduling Conference was held in Helena, Montana, at the Department of Justice, Scott Hart Auditorium, 303 N Roberts, Helena, Montana. At the Scheduling Conference, the Hearing Examiner listened to questions, comments, and suggestions by the Full Parties, and counsel to help in preparation of the prehearing order that will set the conduct for this hearing. Prior to and in anticipation of the Scheduling Conference, a draft proposed schedule for discussion at the Conference was provided to the Petitioners and Full Parties who filed a Notice of Appearance, and a copy was placed on the Department's website. At the Scheduling Conference, the Hearing Examiner reviewed the draft proposed schedule and summarized a proposed hearing procedure. Department of Natural Resources and Conservation (Department) staff in attendance were Cindy Forgey, Administrative Specialist; and Anne Yates, Department staff attorney. The meeting lasted approximately forty minutes.

**The Petitioners who attended the Scheduling Conference are:** The Petitioners appeared by and through legal counsel, Mr. R. Allan Payne.

**Counsel at the Scheduling Conference representing clients that filed a Notice of Appearance are:** Mr. Scott H. Clement, appearing for both the Helena Christian School, and the Cornerstone Village Subdivision. Mr. Michael S. Kakuk, appearing for the Helena Association of Realtors.

**Persons filing a Notice of Appearance (that are not Petitioners) that attended the Scheduling Conference are:** Mr. John Anderson, Mr. Stephen Weber for Stephen and Beverly Weber, and Mr. Steve Skinner (son) for Andy and Carol Skinner. All persons filing a Notice of

Appearance (Full Parties that are not Petitioners) appeared at the Scheduling Conference with the exception of Andy and Carol Skinner. Steve Skinner, appearing for them in their absence, was informed that he cannot represent them unless he is an attorney licensed to practice law in Montana. Attendance at the Scheduling Conference either in person or through counsel was required. Andy and Carol Skinner will not be sanctioned for this abuse of the rules, however, Mr. Steve Skinner was informed that Andy and Carol Skinner themselves must appear in future proceedings unless they retain counsel.

Other matters and concerns discussed at the Scheduling Conference included:

- Mr. Payne voiced concern that the appearance of this proceeding is not unlike that of a contested case. Mr. Payne finds no support for a contested case hearing in this type of proceeding. The Hearing Examiner explained that this is not a proceeding pursuant to the MAPA and as a consequence, the Department's contested case rules do not apply. See Mont. Code Ann. §85-2-519 (repealed), Sec. 500, Ch. 418, L. 1995; A.R.M. 36.12.201. This proceeding is conducted pursuant to Montana Code Ann. §§ 85-2-506 and -507. I find that this Order strikes an appropriate balance between the statutory duty of the Department to hold a full, fair, and orderly proceeding and allow all relevant evidence to be received; and the participants, or counsel to present their cases according to a set of rules which they know in advance. This hearing will go forward without the blanket adoption of a set of existing rules or allowing only an informal proceeding wherein persons are allowed to show up, state their piece, and go home. Where possible, an existing rule or statute will be cited when paralleled by the procedure outlined for use in this proceeding. Copies of the Montana Code Annotated (Mont. Code Ann.) and the Administrative Rules of Montana (A.R.M.) may be found in local libraries and courthouses and online at <http://data.opi.state.mt.us/bills/mca/search.htm> (Mont. Code Ann.) and <http://arm.sos.state.mt.us/> (A.R.M.).

- Mr. Payne voiced concern that there was no opportunity to contest the standing of a Full Party. Mr. Kakuk asked that a determination on this issue be made early in the process. The Hearing Examiner required that Mr. Payne put his concern in the form of a motion due on November 8, 2006, so that other parties may fully understand his contentions. Other Full Parties who wish to respond to any motion received will have ten days from the date of service of the motion.
- Full Party John Anderson stated that his main concern for the area has to do with effects to area water quality. The Hearing Examiner pointed out that the Petition did not allege that ground water withdrawals adversely affecting ground water quality within the ground water area are occurring or are likely to occur. As a result, potential effects to water quality from ground water withdrawals was not included in the Notice for this proceeding. Because neither the Petition nor the Notice included water quality as an issue for hearing, potentially interested persons have not been provided with notice and an opportunity to participate on this issue. Thus, ground water quality is not an issue for this hearing. (See Issues on page 12)
- There was concern that the proposed schedule does not contain a timeframe for contesting discovery requests or responses. The matter has been addressed in this Order. See Schedule, Paragraph Nos. 5, and 7 below.
- The Hearing Examiner asked those present if they wanted discovery left in the schedule, and if yes, would they like to be able to conduct discovery on more than expert witnesses. The responses ranged from yes to allowing the scope of discovery to include lay and expert witnesses, to not allowing discovery at all.
- The Hearing Examiner asked if a final prehearing conference was needed. The consensus response was that a final prehearing conference is not needed. It has been dropped from the schedule. However, the Hearing Examiner reserves the right to

schedule a prehearing conference at a later date if he finds it necessary or helpful to resolve issues prior to hearing.

- The Hearing Examiner reminded all participants that all persons appearing before the Hearing Examiner on behalf of another person or an entity such as a corporation or body of government, must be admitted to the practice of law before the courts of this State. **Individuals may appear *pro-se*, meaning that they may represent themselves, but individuals will not be allowed to speak on behalf of or represent anyone else.** This provision should not be construed to sanction the unauthorized practice of law.
- Counsel for Full Parties who decide to retain legal counsel after October 18, 2006, are required to file a Notice of Appearance with the Hearing Examiner, Petitioners, and other Full Parties on the Official Service List. The Official Service List will be the service list to be used for all service subsequent to this Order unless specified otherwise. A Full Party can at any time prior to the hearing request in writing to change their status to Limited Party. Such notice will be served upon Petitioners and Full Parties on the Official Service List and at that time they will be removed from the Official Service List. The Hearing Examiner shall maintain the Official Service List and any questions regarding the list or a request for a copy thereof should be directed to Kim Overcast at (406) 444-6614. A copy will also be available on the Department website, <http://dnrc.mt.gov/wrd/>. See Procedure, Paragraph 4. SERVICE. on page 13.
- Discussions regarding the procedure were intermixed with discussion of the proposed schedule.

### **ORDER**

Based on the above expressed concerns and discussions at the Scheduling Conference, the **SCHEDULE AND PROCEDURE** for this proceeding will be as follows:

## SCHEDULE

1. **November 8, 2006:** Any Full Party or Petitioner that wishes to object to any part of this Order Setting Schedule and Procedure, or contest the standing of another Full Party, shall file the appropriate Motion and accompanying brief in support by this date. (Please see Procedure, Paragraph 11. MOTIONS on page 18 for further discussion of motions.) Any other Full Party may respond in writing within ten (10) working days of service date of the motion. All motions, briefs, and responses must be served on everyone on the Official Service List. Unless an objection on these two issues is made, all objections will be considered waived.
2. **November 29, 2006:** Deadline for all Petitioners to identify all potential **expert** and **lay** (non-expert) witnesses (**including themselves if they intend to testify**) and provide a brief summary of the substance of each witness's testimony, including a brief summary of any facts and opinion(s) to which an expert is expected to testify, to the Hearing Examiner, and those on the Official Service List. **Witnesses of Petitioners will not be allowed to testify if he/she is not identified, with a summary of testimony as required above, by this date. All witnesses identified need not be called at hearing.**
3. **December 8, 2006:** Deadline for all Non-Petitioner Full Parties to identify all **expert** and **lay** (non expert) witnesses (**including themselves if they intend to testify**) and provide a brief summary of the substance of each witness's testimony, including a brief summary of any facts and opinion(s) to which an expert is expected to testify, to the Hearing Examiner, and those on the Official Service List. **Witnesses of Non-**

**Petitioner Full Parties will not be allowed to testify if they are not identified, with a summary of testimony as required above, by this date. All witnesses identified need not be called at hearing. Full Parties representing themselves (Anderson, Webers and Skinners) must identify themselves as a witness to the other Full Parties and Petitioners, that is, send written notification, if he/she wants to testify at the hearing.**

4. **December 22, 2006**: Discovery requests must be postmarked by this date. (See Procedure, Paragraph 7. DISCOVERY. on page 14 for further discussion of discovery). Discovery will be allowed regarding expert witnesses of Petitioners and Full Parties. Requests for admissions may be sent to Petitioners and Full Parties and are not limited to the subject of expert witnesses. There will be no discovery of Limited Parties. Discovery requests postmarked after this date will not be allowed. Each Petitioner or Full Party is limited to one set of discovery requests for each other Petitioner or Full Party. The attorneys supporting or opposing the Petition are encouraged to coordinate discovery requests to eliminate duplicate requests and are encouraged to standardize their discovery (use the same set of discovery requests). Petitioners and Full Parties have 30 calendar days from the service date of the properly filed discovery request to respond to requests for discovery (interrogatories, requests for production, and requests for admissions). If a Petitioner or Full Party fails to reasonably comply with a proper demand for discovery, the Hearing Examiner **may apply discovery sanctions, including not being allowed to testify at the**

**hearing, as further set forth in** Procedure, Paragraph 7.

DISCOVERY. on page 14.

Discovery requests and answers need only be served on the party requesting or responding with a copy to the Hearing Examiner.

Discovery responses will be by hard copy as opposed to an electronic format unless specifically requested.

5. **January 5, 2007:** Deadline for contesting discovery requests by motion to the Hearing Examiner and copy to all Full Parties. See Procedure, Paragraph 7 DISCOVERY, on page 15. Parties have ten (10) working days to respond from the date of service.
6. **January 26, 2007:** Discovery regarding experts of Petitioners and Full parties **ends** (i.e., discovery answers must be postmarked by this date) except for any depositions. **This means that if you get a set of questions or requests for information or admissions (postmarked by the deadline in Paragraph 4 above) you must postmark your written response by this date or within 30 calendar days of the discovery request postmark date, whichever is sooner.**

Parties shall begin to coordinate times and places for any depositions.

**Deadline for Staff Expert to submit written comments on ground water information submitted with petition** to the Hearing Examiner, Petitioners, and Full Parties in this matter.

7. **February 9, 2007:** Deadline to request subpoenas as set out in Procedure, Paragraph 13. SUBPOENAS, on page 19.



Deadline to contest discovery responses by motion, including motions for discovery sanctions, to the Hearing Examiner and copy to Petitioner or Full Party against whom sanction is sought. See Procedure, Paragraph 7 DISCOVERY, on page 15. Parties have ten (10) working days to respond from the date of service.

8. **February 23, 2007:** Deadline to depose all witnesses including Staff Expert. All depositions must be completed by this date. Each party is expected to make their witnesses available for deposition if requested and to coordinate schedules for the convenience of all involved. Witnesses to be deposed must be noticed with a copy to everyone on the Official Service List and the Hearing Examiner. **The Hearing Examiner may apply discovery sanctions if a witness fails to appear for deposition.**
9. **March 2, 2007:** Deadline for supplementing discovery responses for all parties. This means all supplemental discovery responses have been submitted by this date.
10. **March 9, 2007:** Final day to **file written pre-filed direct testimony** (in question / answer format) of all experts to the Hearing Examiner, Petitioners, and all other Full Parties (or their counsel if represented). This is the final day to provide **copies** (hard) **of exhibits** to all Petitioners and Full Parties and a **list** of exhibits to the Hearing Examiner. Hard copies of all exhibits Petitioners or a Full Party intends to use at hearing **must be served on everyone on the Official Service List.** Discovery sanctions, including exclusion of exhibits from hearing, may apply for failure to exchange exhibits as required.

11. **March 16, 2007:** This is the date by which Petitioners and Full Parties must file (postmark) and serve (mail copies to everyone on the Official Service List) any pre-hearing motions (as set out in Procedure, Paragraph 11. **MOTIONS** on page 18). Parties will have 10 working days from the date of service of the motion to file a written response to any motion. Copies of motions, briefs and responses must be served on everyone on the Official Service List with the original to the Hearing Examiner.
12. **April 16-17, 2007:** Two-part Hearing in Helena, Montana.

**Part One** will begin **April 16, 2007**, at **5:30 p.m.** at the Department of Health and Human Services Auditorium, 111 N Sanders, Helena, MT (Use the North Entrance), and be for Limited Parties. Part One will end when all Limited Parties present have had an opportunity to present testimony<sup>1</sup>. The time allowed for Limited Party testimony may be limited by the Hearing Examiner. All testimony shall be given under oath or affirmation and is subject to cross-examination by a Full Party. Full Parties may attend and observe the hearing for Limited Parties.

**Part Two** to begin on **April 17, 2007**, at **8:30 a.m.** at the Department of Health and Human Services Auditorium, 111 N Sanders, Helena, MT (Use the North Entrance) and will be the hearing for Petitioners and other Full Parties. All testimony shall be given under oath or affirmation and is subject to cross-examination by other Full Parties. Limited Parties

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<sup>1</sup> A Limited Party may submit written testimony. In order to be included in the record, written testimony must be accompanied by the following notarized statement: "I AFFIRM THE STATEMENTS APPEARING IN THIS WRITTEN TESTIMONY OR EVIDENCE ARE TRUE AND CORRECT, AND ANY DOCUMENT COPIES USED IN OR ATTACHED TO THE WRITTEN STATEMENT ARE TRUE AND CORRECT COPIES." A notary will be available at the hearing. Limited Parties submitting written testimony must be available for questioning at the Limited Party (Part 1) hearing.

may attend and observe the hearing for Full Parties. In the event Part Two of the hearing is not concluded April 17, 2007, it will be held on successive days until concluded (excepting weekends and holidays).

13. **May 4, 2007:**

Deadline for postmark of any Petitioner or Full Party to file a post hearing brief, or statement of position, or proposed findings (in electronic format) with the Hearing Examiner and hard copy to all Petitioners or Full Parties. A copy must be served on everyone on the Official Service List.

## **PROCEDURE**

### **HEARING ISSUES**

1. **ISSUES.** Neither the Petition nor the Notice of this proceeding included water quality as a basis for the controlled ground water request. Thus, potentially interested persons have not been provided with notice and an opportunity to participate on any issue not alleged in the Petition, and any issue not noticed. In addition, it can be argued that issues not raised in the petition have not met the petition requirements of Mont. Code Ann. §85-2-506(2), i.e. in this case, 20 or one-fourth of the ground water users within the proposed area. This hearing is being conducted pursuant to Montana Code Annotated §§85-2-506 and -507 (2005), which requires that the proceeding must secure a full, fair, and orderly proceeding and permit all relevant evidence be received. Mont. Code Ann. §85-2-506(1). Thus, the alleged and noticed issues limit the relevant evidence of this proceeding to:

- A) Ground water withdrawals are in excess of recharge to the aquifer or aquifers within the area;
- B) that excessive ground water withdrawals are very likely to occur in the near future because of significant increases in withdrawals from within the ground water area;
- C) that significant disputes regarding priority of rights, amounts of ground water in use by appropriators, or priority of type of use are in progress within the ground water area; and
- D) that ground water levels or pressures in the area in question are declining or have declined excessively.

### **TERMS**

2. **PARTIES.** "Party" means: (1) those persons who are Petitioners, and are Full Parties, or (2) those persons that filed a Notice of Appearance by October 10, 2006, and are Full Parties, or (3) those persons who attend the hearing in this matter and present oral or written testimony, but do not wish to participate in prehearing activities, and are Limited Parties.

All Parties, except those individuals who are representing their own interests, must make all appearances in this matter through legal counsel. A person who is not an attorney cannot represent someone else, especially a corporation or body of government. Testimony and evidence may be excluded if a party is not properly represented.

3. **FILINGS.** The original of all motions, briefs, etc. must be filed with the Hearing Examiner at:

Charles F. Brasen, Hearing Examiner  
Water Resources Division  
Department of Natural Resources  
and Conservation  
PO Box 201601  
Helena, Montana 59620-1601

4. **SERVICE.** A Certificate of Service accompanies this Order. It will also be called the Official Service List which lists Petitioners and Full Parties (or counsel) that attended the Scheduling Conference. The Official Service List will be maintained by the Department and posted on its website. The Official Service List will be the service list to be used for service subsequent to this Order. Service must include a certificate of service that identifies all persons to whom you have sent the document. Faxed documents are allowed. The document must be faxed to all parties on the Official Service List in addition to the Hearing Examiner by the deadline, and the original must be provided to the Hearing Examiner within 5 days. However, the Hearing Examiner notes that all parties on the Official Service List may not have fax numbers. Service is not effective if not served on all parties as required by this Order. Documents not served in accordance with this Order will not be considered by the Hearing Examiner. When a party is represented by an attorney, service upon the attorney shall constitute service upon the party. EMAIL MOTIONS, RESPONSES, DISCOVERY, AND OTHER DOCUMENTS WILL NOT BE ACCEPTED. SERVICE MAY NOT BE MADE BY EMAIL.

A document is considered served when it is mailed first class postage prepaid, faxed or hand-delivered to the recipient in accordance with this Order.

5. **DATES.** Unless otherwise noted, all deadline dates are postmarked mailing dates. The time within which an act is to be done shall be computed by excluding the first day (the date of service) and including the last. Deadline dates that fall on a weekend or legal holiday move to the next business day. Parties are urged to check local U.S. Postal Service postmarking policies to assure a deadline is not missed because postmarking occurs at a date later than the deposit date. Faxed documents must be received by 5:00 p.m. on the deadline date. The Department will follow Administrative Rules of Montana (A.R.M.) 36.12.209.

6. **DEFAULT.** The Department will follow A.R.M. 36.12.208, modifying the last sentence to substitute Petitioners (“applicant”) and persons opposing the petition (“objectors”). A default occurs when a party fails to appear at a hearing or fails to comply with any interlocutory orders of the Hearing Examiner. Upon default, the defaulting party's claim or interest in the proceeding may be dismissed (with or without prejudice), denied, disregarded or disposed of adverse to the defaulting party.

7. **DISCOVERY.** Discovery may commence upon receipt of this Order. There will be discovery only on the subject of expert witnesses of Full Parties and Petitioners, with the exception that requests for admissions may also be made upon any relevant subject to Petitioners and Full Parties. Petitioners and other Full Parties have 30 calendar days from the service date of the request to respond to properly filed requests for discovery (interrogatories, requests for production, and requests for admissions). If a Petitioner or Full Party fails to reasonably comply with a proper demand for discovery, the Hearing Examiner may refuse to allow the party failing to comply to support or oppose designated claims or defenses, or prohibit that party from introducing designated matters into evidence as further described below: If information changes or becomes available that is responsive to a discovery request, you have an obligation to supplement your answer up to the date of the deadline for supplemental

response set forth above. Information not provided to a Full Party (but requested by the Full Party in discovery) by that date may not be admitted at hearing. Discovery requests and response are not part of the record unless introduced and admitted at the hearing.

The Department will follow A.R.M. 36.12.215 as modified below primarily to reflect that discovery responses are due thirty days after service and discovery is for persons with Full Party status. A.R.M. 36.12.215 states as modified:

(2) Each ~~party~~person with Full Party status shall, within ~~40~~ 30 days of a demand by another ~~party~~person with Full Party status, disclose the following:

(a) The names and addresses of all expert witnesses that a ~~party~~person with Full Party status intends to call at the hearing together with a brief summary of the facts and opinions to which each expert is expected to testify~~each witness's testimony~~. All expert witnesses unknown at the time of said disclosure shall be disclosed, together with a brief summary of their testimony, described above, as soon as they become known.

(b) Any relevant written or recorded statements made by the ~~party or by expert~~ witnesses on behalf of the ~~party~~person with Full Party status shall be permitted to be inspected and reproduced by the demanding parties.

(3) Any ~~party~~person with Full Party status unreasonably failing upon demand to make the disclosure by this rule, may be foreclosed from presenting any evidence at the hearing through witnesses not disclosed or through witnesses whose statements are not disclosed.

(4) A ~~party~~person with Full Party status may serve upon any other ~~party~~person with Full Party status a written request for the admission of relevant facts or opinions, or of the application of law to relevant facts or opinions, including the genuineness of any document. The written answer shall either admit or deny the truth of the matters contained in the request, or shall make a specific objection thereto. Failure to make a written answer may result in the subject matter of the request being deemed admitted.

(5) omitted

(6) Any means of discovery available pursuant to the Montana Rules of Civil Procedure, excepting Rule 37(b)(1) and 37(b)(2)(D), is allowed provided such discovery is needed for the proper presentation of a ~~party~~person with Full Party status's case, is not for purposes of delay, and

the issues in controversy are significant enough to warrant such discovery. Copies of all requests for discovery under this subsection must be filed with the hearings examiner. Objection for a demand for discovery may be made by motion to quash, and the form, filing, and disposition of such motion shall be governed by the provisions of ~~ARM 36.12.213~~ this Order. If a ~~party~~person with Full Party status fails to reasonably comply with a proper demand for discovery, the hearing examiner may:

(a) order that the subject matter of the order for discovery or any other relevant facts be taken as established for the purposes of the case in accordance with the claim of the ~~party~~person with Full Party status requesting the order; or

(b) refuse to allow the ~~party~~person with Full Party status failing to comply to support or oppose designated claims or defenses, or prohibit that ~~party~~person with Full Party status from introducing designated matters into evidence.

(7) omitted.

8. **DEPOSITIONS.** The Department will follow A.R.M. 36.12. 216 as modified below regarding depositions to preserve testimony. A.R.M. 36.12. 216 provides:

(1) Upon the motion of any ~~party~~person with Full Party status, the hearing examiner may order that the testimony of any expert witness be taken by deposition to preserve that witness' testimony in the manner prescribed by law for depositions in civil actions, which includes the right of other ~~parties~~persons with Full Party status to attend the deposition and cross-examine the witness. The motion shall indicate the relevancy and shall make a showing that the witness will be unable or cannot be compelled to attend the hearing or show other good cause. No part of a deposition shall constitute a part of the record unless received in evidence by the Hearing Examiner.

For depositions for discovery purposes, a person with Full Party status shall file a notice of deposition in writing with the Hearing Examiner for the attendance of witnesses or the production of documents and the request shall contain a brief statement demonstrating the potential relevance of the testimony or evidence sought and shall identify any documents sought with specificity, and shall name all persons to be ordered to appear. The Hearing Examiner will then issue an order for the appearance of the witness and/or production of documents as appropriate for a time and date certain.



The Hearing Examiner may apply the discovery sanctions referenced in Paragraph 7. above if a party fails to comply with an order.

9. **EVIDENCE.** The Department will follow A.R.M. 36.12. 221 regarding evidence. A.R.M. 36.12. 221 as modified for Full Party status states;

(1) The common law and statutory rules of evidence shall apply only upon stipulation of all parties to the hearing. Otherwise, the hearing examiner may admit all evidence that possesses probative value, including hearsay if it is the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs. The hearing examiner shall give effect to the rules of privilege recognized by law. Evidence which is irrelevant, immaterial, or unduly repetitious may be excluded.

(2) The department file shall be deemed part of the record in its entirety unless objections are made to a specific portion thereof upon review by the parties. If the objection is sustained, that portion of the file will not be made a part of the record. All other evidence to be considered in the case, including all records and documents in the possession of a party (or a true and accurate photocopy thereof), shall be offered and made a part of the record in the case. No other factual information or evidence shall be considered in the determination of the case.

(3) Documentary evidence in the form of copies or excerpts may be received or incorporated by reference. Upon request, ~~parties~~persons with Full Party status shall be given an opportunity to compare copies with the originals.

(4) The hearing examiner may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the department's specialized knowledge. Parties shall be notified, either before or during the hearing or by reference in the proposal for decision of the material noticed. Each ~~party~~ person with Full Party status shall be afforded an opportunity to contest the materials so noticed.

(5) A ~~party~~ person with Full Party status may call an adverse witness who may be a party's managing agent or employees, or an officer, director, managing agent, or employee of the state or any political subdivision thereof, or of a public or private corporation or of a partnership or association or body politic which is an adverse party, and interrogate the adverse witness by leading questions and contradict and impeach the adverse witness on material matters in all respects as if the adverse witness had been called by the adverse party. The adverse witness may be examined by counsel for the adverse witness upon the subject matter of the examination in chief under the rules applicable to direct examination, and may be cross-examined, contradicted, and impeached by any other party adversely affected by the adverse witness' testimony.

10. **EX PARTE CONTACTS.** *Ex parte* communications with the Hearing Examiner concerning any issue of fact or law are prohibited. That is, communicating directly with the

Hearing Examiner *without all parties present* regarding your views on the facts or law of the case is not allowed. However, *procedural* questions about how the hearing will be conducted or matters of that sort can be directed to the Hearing Examiner. The Department will follow A.R.M. 36.12.230 with regard to *Ex Parte* communications. All initial contact with the Hearing Examiner shall begin with Kim Overcast at (406)-444-6614.

11. **MOTIONS.** All requests for orders to the Hearing Examiner shall be made by motion in writing unless made during the hearing. You may submit a brief in support of your motion. Copies of written motions must be served on everyone on the Official Service List, and filed with the Hearing Examiner with a certificate of service attached. Any party wishing to contest the motion must file a written response with the Hearing Examiner, and serve everyone on the Official Service List, with a certificate of service attached. The response must be filed within ten (10) working days from the service date of the motion. The Department will apply A.R.M. 36.12.213 including the portion of the third sentence requiring that any motion include notice to other parties that should they wish to contest the motion they must file a written response, with a certificate of service attached, within ten days after service of the motion. **MOTIONS FILED WITHOUT THE REQUIRED NOTICE WILL BE RETURNED AS IMPROPERLY FILED.** The Department will follow A.R.M. 36.12.222 for motions for a continuance of the hearing. Please title your motion and/or response so that the Hearing Examiner can determine to what subject or motion it refers. EMAIL MOTIONS AND RESPONSES WILL NOT BE ACCEPTED.

12. **THE RECORD.** The decision will be made on the facts in the record at the time the record in this proceeding is closed, i.e. conclusion of the hearings. The record in this matter consists of the Department file in this case consisting of all documents beginning with the Petition and all Department documents added since that time. In addition, all testimony and evidence received at the hearing shall be a part of the record in its entirety and considered in reaching the decision in this matter unless objections by parties, after review, are made to a specific portion thereof. If an objection is sustained, that portion of the file or testimony will not

be considered in reaching a final decision but will remain a part of the record for appeal.

Discovery requests and responses, including depositions, are not part of the record unless introduced and admitted at hearing. All relevant evidence will be considered in the case if presented as required in the procedures set forth in this matter.

13. **SUBPOENAS.** The Department will follow A.R.M. 36.12.217(1) and (2). Mont. Code Ann. §85-2-513.

a. Subpoena requests must be made in writing to the Hearing Examiner and must include a brief statement demonstrating the potential relevance of the testimony or evidence sought and must identify any documents sought with specificity.

b. To have an effective subpoena, a party must present witness fees and mileage if requested. Mont. Code Ann. §§ 26-2-502, -507.

c. A party who wishes to have a Department employee, other than Russell Levens, testify at the hearing must subpoena that employee and reimburse the State of Montana for employee time spent when called to testify in connection with the employee's official duties in an action where the Department is not a party. Mont. Code Ann. §26-2-515.

d. **Discovery sanctions may apply if a witness fails to appear.**

14. **STAFF EXPERT.** The Hearing Examiner hereby appoints Mr. Russell Levens, DNRC Hydrogeologist, as Staff Expert in this matter. Mr. Levens will attend the hearing scheduled in this matter to be held beginning April 16, 2007, in Helena, Montana, to offer his credentials, be called by any party or the Hearing Examiner to be cross-examined on any reports or memoranda he has written regarding this matter, and any other aspects of his expert opinion, and to assist the Hearing Examiner in evaluating evidence presented by the parties. Nothing in this notice shall prevent a party from producing other expert evidence or rebuttal to Mr. Levens' comments. Mr. Levens will be available for deposition according to the schedule in this matter.

15. **PROCEDURE FOR THE HEARING.** The Department will conduct the hearing through the duly appointed Hearing Examiner. The Hearing Examiner will arrange and conduct the pre-

hearing process and the hearing itself. **All oral testimony at the hearing shall be under oath or affirmation.** The Hearing Examiner will issue orders and control the proceeding as necessary for a full, fair, and orderly hearing. The Hearing Examiner will issue proposed findings of fact, proposed conclusions of law, and a proposed decision. Full Parties and Petitioners may file exceptions to the proposed findings of fact, proposed conclusions of law, and a proposed decision and may be heard at oral argument on those exceptions. The Department will follow A.R.M. 36.12.223 for the presentation of evidence by persons with Full Party status. The Department will follow A.R.M. 36.12.224 with regard to disruption of the hearing.

16. This proceeding is conducted pursuant to Mont. Code Ann. §§85-2-506, -507 as set out in this Order. Links to the Montana Code Annotated can be found at the following website <http://courts.mt.gov/library/> . Links to the Administrative Rules of Montana can be found at the following website <http://arm.sos.mt.gov/> . Most public libraries have copies of the Montana Code Annotated and the Administrative Rules of Montana.

On hearing day, the procedure for the Petitioner and Full Party hearing (Part 2) will be as follows:

- a. Opening remark by Hearing Examiner.
- b. Brief Opening Statement by Petitioner Spokesperson.
- c. Opponent cross-examination of Petitioner expert witnesses that submitted pre-filed direct written testimony
- d. Petitioner direct testimony (lay witnesses that were not required to pre-file direct testimony)
- e. Opponent cross-examination of Petitioner lay witnesses not required to pre-file direct testimony
- f. Non-Petitioner Proponent Full Party direct-Testimony
- g. Non-Petitioner Proponent Full Party cross-Examination
- h. Petitioner cross-examination of opponent Full Party expert witnesses that submitted pre-filed direct written testimony
- i. Opponent Full Party direct testimony (lay witnesses that were not required to pre-file testimony)

- j. Opponent Full Party cross-examination of lay witnesses that did not pre-file testimony
- k. Rebuttal is available at the discretion of the Hearing Examiner.
- l. A closing remark by the Hearing Examiner.

Petitioners and Full Parties may present evidence, call witnesses, and cross-examine witnesses at hearing. Limited Parties may offer public testimony during Part One of the hearing. A Limited Party may not call other witnesses, examine or cross-examine any other witness. A Limited Party may submit written testimony at the hearing for Limited Parties. In order to be included in the record, written testimony must be accompanied by the following notarized statement: "I AFFIRM THE STATEMENTS APPEARING IN THIS WRITTEN TESTIMONY OR EVIDENCE ARE TRUE AND CORRECT, AND ANY DOCUMENT COPIES USED IN OR ATTACHED TO THE WRITTEN STATEMENT ARE TRUE AND CORRECT COPIES." A notary will be available at the hearing. A Limited Party submitting written testimony must be available for questioning at the hearing. Written testimony may be excluded if the Limited Party submitting the testimony is not available at **Part One** of the hearing for cross-examination.

17. The Department will follow this Order, Mont. Code Ann. §§85-2-506, -507, A.R.M. 36.12.226 – 36.12.228, and 36.12.234 (excluding MAPA statutory references), and other A.R.M.'s specifically cited in this Order with regard to the record in this matter and decision. The Department will follow A.R.M. 36.12.229(1), excluding MAPA statutory references, with regard to exceptions to the proposed decision although only persons with Full Party status may file exceptions to the proposed decision.

18. The terms of this Order may be modified or clarified at a later date if necessary. The Hearing Examiner reserves the right to enter additional orders as may be required.

Dated this 27<sup>th</sup> day of October 2006.

/ Original Signed By Charles F Brasen /

Charles F Brasen  
Hearing Examiner  
Department of Natural Resources and Conservation  
PO Box 201601  
Helena, MT 59620-1601

## CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the ORDER SETTING SCHEDULE AND PROCEDURE was served upon all parties listed below on this 27<sup>th</sup> day of October 2006 by First Class United States Mail.

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/ Original Signed by Jamie Price /

Jamie Price  
Hearings Unit, DNRC